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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of Petition of Ameritech)
For Forbearance From Enforcement of)
Section 275(a) of the Communications)
Act of 1934, As Amended)

CC Docket No. 98-65

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**AMERITECH'S REPLY TO
THE COMMENTS ON ITS PETITION FOR FORBEARANCE**

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Ameritech Corporation ("Ameritech"), including its subsidiary SecurityLink from Ameritech, Inc. ("SFA") (formerly known as Ameritech Monitoring Services, Inc.), hereby replies to the comments filed on June 19, 1998 by the Alarm Industry Communications Committee ("AICC") and AT&T Corp. ("AT&T"). In their comments, AICC and AT&T opposed the petition for forbearance (the "Petition") filed by Ameritech on May 13, 1998 pursuant to Section 10 of the Communications Act of 1934, as amended (the "Communications Act" or the "Act"), 47 U.S.C. § 160. In that Petition, Ameritech requested that the Commission forbear from the enforcement of Section 275(a) of the Act, 47 U.S.C. § 275(a).

Summary

Ameritech demonstrated in its Petition that the requested forbearance is warranted because enforcement of Section 275(a) is (1) not necessary to insure that Ameritech's alarm monitoring rates and practices are just and non-discriminatory, (2) not necessary to protect consumers of alarm monitoring services, and (3) not in the overall public interest. Neither AT&T nor AICC presents any evidence that meaningfully challenges Ameritech's showing. Instead, AT&T argues that the Commission must determine whether the three criteria are met with regard to a different set of consumers in a different market -- Ameritech's alarm monitoring service competitors who are consumers of in-region local exchange services. AICC similarly argues that enforcement of Section 275(a) is necessary because Ameritech's local exchange market power still provides it the opportunity to engage in anticompetitive and discriminatory actions against competing alarm monitoring service providers.

All of these arguments boil down to one -- forbearance should be denied because Ameritech has control of its in-region local exchange facilities. This argument misses the mark - a showing of reduced control over local exchange facilities is not the standard for forbearance under Section 160(a). Moreover, it is telling that AICC and AT&T have not identified a single instance of discrimination, cross-subsidization or other anticompetitive conduct by Ameritech, nor have they

even articulated a plausible theory of how such anticompetitive activity could be successfully conducted. Also notably absent from both AT&T's and AICC's discussions is any mention of the effect of forbearance on the broader public interest, and most particularly of the effect on the consumers on whom the Commission's analysis should be focused -- who are the consumers of alarm monitoring services throughout the United States. None of the arguments made by AT&T and AICC in their comments changes the fact demonstrated in the Petition: the three statutory criteria are met with regard to the alarm monitoring services customers throughout the U.S., which is the relevant market. Even when the possible effects on other markets are taken into account, forbearance remains clearly in the public interest. Congress crafted the language of Section 160 of the Act so that when the Commission finds that these three criteria have been met, it *shall* forbear from applying the relevant provision of the Communications Act to the telecommunications carrier in question.

Contrary to the arguments offered by AICC and AT&T, the requested forbearance is consistent with statutory language and Commission precedent and is constitutional. Thus, the Commission must forbear from applying Section 275(a) to Ameritech.

I. The Filing of This Petition in No Way Constitutes a Concession that Section 275(a) Precludes Any of Ameritech's Past Acquisitions

Throughout its comments, AICC argues that the filing of Ameritech's petition somehow indicates that Ameritech has abandoned its position that its past alarm monitoring asset acquisitions are permitted under Section 275(a). Nothing could be further from the truth, as Ameritech has made clear. See Petition at 3, 8 and 27-28. Ameritech has demonstrated that each of those asset acquisitions is consistent with Section 275(a). Ameritech will continue to litigate those related issues if necessary, but even successful resolution of the pending motions would not preclude AICC or others from filing motions against future Ameritech asset acquisitions. Also, and most importantly, forbearance would return to Ameritech the right to make equity acquisitions -- a right far more valuable than the ability to make asset acquisitions. Finally, as discussed in our petition, forbearance provides a vehicle for the Commission to avoid having to decide substantial constitutional issues. Petition at 29-30.

After agreeing with Ameritech that Section 275 represents a legislative "compromise" (AICC Comments at 5), AICC argues that the compromise should be adhered to. This position amounts to total hypocrisy. AICC is the entity that has attempted to interpret Section 275(a) in a manner inconsistent with the language of the compromise. Despite the fact that the compromise allows Ameritech

to make asset acquisitions but not equity acquisitions, AICC has challenged Ameritech's asset acquisitions, taking the position that Section 275(a) prohibits all growth by acquisition – a position that cannot be supported by the language of the compromise.¹

II. The Commission Should Forbear Because All Three Statutory Criteria Are Met

The language of Section 160(a) provides that the Commission "shall forbear from applying" a provision of the Act to a telecommunications carrier when the criteria in Section 160(a) are met. The Conference Report confirms that Section 160(a) "*requires* the Commission to forbear from applying any provision of the Communications Act" in those circumstances.² Because all three statutory criteria are clearly met here, forbearance is required

¹ AICC is correct when it asserts that Section 275(a) "would read differently" if AICC had written it (AICC Comments at 5). It would read, as did proposed language that was rejected by Congress, so as to prohibit asset acquisitions.

² H.R. Conf. Rept. 104-458, 104th Cong., 2d Sess. (1996) at 184-185 (emphasis added).

A. Enforcement of Section 275(a) is not necessary to ensure that Ameritech's charges and practices are just, reasonable and non-discriminatory

Section 160(a)(1) directs the Commission first to determine whether enforcement of the specific provision at issue "is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory." Ameritech has demonstrated that enforcement of Section 275(a) with regard to Ameritech is unnecessary because the alarm monitoring services market in the United States is competitive and Ameritech cannot employ unjust or discriminatory practices against its competitors. Petition at 10-13.

Neither AICC nor AT&T argues that the national alarm monitoring services market is *not* highly competitive or denies that Ameritech has only a seven or eight percent share of the national market. See AT&T Comments at 4-5; AICC Comments at 14-17. As the Commission has repeatedly recognized, a company with such a minor market share in a highly competitive market is unable to engage in unjust practices or to charge unreasonably discriminatory prices. Any attempt to do so would cause alarm monitoring consumers to switch to one of Ameritech's competitors, resulting in lost revenue and profits for Ameritech. See Petition at 11-13. This un rebutted demonstration that Ameritech's charges and practices in the

alarm monitoring services market will necessarily be just and reasonable satisfies the first element of the Section 160(a) forbearance test.

Because they cannot challenge the facts that compel this conclusion, AICC and AT&T attempt to obscure the issue by arguing that the Commission should focus on an irrelevant issue -- the charges, practices, classifications and regulations of Ameritech vis-à-vis those alarm monitoring service competitors who are also its local exchange customers. See AT&T Comments at 4-6; AICC Comments at 15-16. There is no legal or factual basis to this argument. First, outside its region, Ameritech has no local exchange customers. Therefore, such customers could not conceivably be the focus of the Section 160 inquiry in the context of potential Section 275 forbearance. Second, inside its region, state and federal regulation protects local exchange customers. In any event, even though these concerns are not relevant to the analysis under Section 160(a)(1) or (2), Ameritech has demonstrated conclusively that regulatory safeguards restrict its ability even to attempt to harm competitors in the alarm monitoring services business. Petition at 12-20. Notably, neither AT&T nor AICC has identified a single instance where Ameritech has used its local exchange facilities to confer an improper advantage on SFA.

AT&T also argues (AT&T Comments at 4) that the Computer III non-structural safeguards are irrelevant simply because they predate the 1996 Act, but the

Commission itself has already twice rejected this argument.³ AICC offers the alternative argument that the Computer III and ONA safeguards are insufficient to protect Ameritech's competitors from unjust or unreasonably discriminatory practices, but it offers no evidentiary support for the claim. Because Ameritech has presented compelling evidence that it cannot use unjust or unreasonable practices or charges against consumers or competitors in the alarm monitoring services market, the Commission should find that the requirements of Section 160(a)(1) have been satisfied.

B. Enforcement of Section 275(a) is not necessary for the protection of consumers

Section 160(a)(2) directs the Commission also to determine whether enforcement of Section 275(a) "is not necessary for the protection of consumers." Ameritech has already demonstrated, and neither AICC nor AT&T disputes, that the Commission has consistently found that the same reasons that lead to the conclusion that enforcement of a particular Communications Act provision is not necessary to ensure just and reasonable rates and charges, also lead to the conclusion that

³ See generally Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, CC Docket No. 96-150, 11 FCC Rcd 17539 (1996); 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements, 13 FCC Rcd 6040 (1998) (released Jan. 30, 1998).

enforcement is not necessary for the protection of consumers. Petition at 14. The evidence in the Petition demonstrates that the Commission should reach the same conclusion here, because market forces, the Commission's administration of the Section 275 complaint process, the federal and state antitrust laws and state consumer protection and contract laws are individually and collectively sufficient to protect consumers, both directly and (through the protection of competition) indirectly. *Id.* at 15-20. Neither AT&T nor AICC presents any evidence that suggests that enforcement of Section 275(a) is necessary to protect Ameritech's *alarm monitoring services* consumers. See AICC Comments at 17-18; AT&T Comments at 7. Thus, they implicitly concede that the second requirement of Section 160(a)(2) has been met.

AICC unsuccessfully attempts to sidestep the issue by making the unsupported assertion that Congress definitively decided that the available federal and state safeguards were not sufficient to protect alarm monitoring service

consumers. AICC Comments at 17.⁴ However, it cites nothing, either in the text of Section 275 or the legislative history, to support this claim. See id. at 17-18.

In short, there are numerous reasons why the Commission should conclude that enforcement of Section 275(a) against Ameritech is simply not necessary to protect any consumer.

C. Forbearance is clearly in the public interest

The final forbearance factor is set out in Section 160(a)(3), which directs the Commission to determine whether enforcement of Section 275(a) "is not in the public interest." Forbearance clearly serves the public interest here by allowing Ameritech to achieve economies of scale through equity or asset acquisitions, with attendant cost savings which will be passed through to consumers, and by permitting Ameritech to offer new services to consumers of alarm monitoring services, thereby

⁴ AICC alternatively asserts that alarm monitoring services firms, as consumers of Ameritech's local exchange services, will be harmed if Ameritech engages in discriminatory practices. AICC Comments at 17. AICC's argument conveniently ignores the fact that it is consumers of alarm monitoring services, not local exchange services, whose interests are at issue when the Commission considers whether to forbear from applying Section 275 to Ameritech. In any event, Ameritech has already demonstrated that this alleged potential harm to consumers of local exchange services only applies to a discrete subset of Ameritech's customers who are alarm monitoring firms located in Ameritech's five in-region states. Petition at 12-20, 26. Thus, it is not surprising that AICC is unable to identify a single instance of discrimination or even to articulate a theory of how such discrimination could be successfully attempted.

increasing competition.⁵ Ameritech has provided concrete examples of how recent asset acquisitions have already benefitted and will continue to benefit consumers, such as the innovative, no money-down installation programs and the state-of-the-art alarm monitoring facility in Florida. Petition at 21-25.

Ameritech's competitors in the AICC do not challenge the nature of the benefits that Ameritech is bringing to consumers. Instead, they raise once again the discredited specter of potential discrimination by Ameritech against in-region competitors. Neither AT&T nor AICC is able to identify an instance of discrimination or a theory as to how Ameritech could successfully discriminate, which is not surprising, since Ameritech has demonstrated that this argument is a red herring (see pp. 5-7, *supra*, and Petition at 18-20). This time AICC also propounds a preposterous "raising rivals' costs" theory about anticompetitive effects in out-of-region alarm markets.⁶ The argument completely fails to take account of the fact that the majority of the 13,000 alarm monitoring firms in the U.S. are regional or local firms located outside of Ameritech's in-region market. Even if Ameritech could discriminate against or raise the costs of competitors in-region, these out-of-region

⁵ See In the Matters of Bell Operating Companies Petitions for Forbearance from the Application of Section 272, 13 FCC Rcd 2627, 2644, 2671 (1998). at ¶ 29 and ¶ 97 (factor favoring forbearance is that it allows for greater economies of scale) ("*Section 272 Forbearance Order*").

⁶ AICC Comments at 20, n.45.

alarm monitoring services firms would be unaffected. Therefore, these thousands of competitors would continue to serve as a competitive check on Ameritech in any scenario AICC can dream up.

Finally, AT&T incorrectly contends that before the Commission can grant Ameritech's petition for forbearance, the Commission must find that forbearance furthers competition among telecommunications services providers. The Commission explicitly rejected this interpretation of the "public interest" standard the last time AT&T advanced it, stating that "a determination that forbearance would promote competition [among telecommunications providers] is a possible, though not a necessary, basis for a finding that forbearance would be consistent with the public interest."⁷

Because Ameritech has demonstrated that forbearance will have significant procompetitive impact and is consistent with the public interest, and Ameritech's competitors and AT&T have failed to rebut that showing, the third and final element of the forbearance test is satisfied. In fact, a failure by the Commission to forbear from enforcement of Section 275(a) will harm the public interest through the loss of the higher quality services and lower prices Ameritech has to offer.

⁷ *Section 272 Forbearance Order* at 2651-52, ¶¶ 48-49.

III. The Requested Relief Is Within The Scope of The Commission's Forbearance Authority

AICC and AT&T advance two additional arguments that are not based on either Section 160(a) or Section 275(a). Both arguments border on the frivolous and can be quickly dismissed.

A. The Commission is not required to find changed circumstances in the local exchange market before granting Ameritech's petition for forbearance

AICC contends that even if the Commission, using its substantial experience and expertise, determines that the three criteria of Section 160(a) are met, it must ignore the mandatory language of that provision because there has been no showing that circumstances have changed with regard to BOC provision of alarm monitoring services since the enactment of the 1996 Act. With no citation to statutory language or legislative history, AICC claims that "a demonstration of changed circumstances is a condition precedent to any exercise of forbearance authority by the Commission." AICC Comments at 2; see also *id.* at 5-13.

AICC's argument is, to put it charitably, made up out of whole cloth. While it is unclear from what source AICC derived its "changed circumstances" theory, the notion clearly did not come from the text of the statute. Neither Section 160 nor Section 275 indicates that changed circumstances are a prerequisite to

forbearance. In the absence of evidence of contrary Congressional intent in the legislative history (and there is none), the clear language of the statutory provisions at issue is conclusive.⁸ This hoary maxim of statutory construction is confirmed in this instance by the fact that when Congress has intended changed circumstances to be a consideration in other statutes, it so provided in explicit language.⁹ Additionally, Congress expressly limited forbearance of certain sections of the Telecommunications Act until certain preconditions were met.¹⁰ Section 275 is conspicuously absent from that list, providing further evidence that Congress did not

⁸ See Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361, 368 (1986) (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984)). See also Kmart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988); Aubert v. American General Finance, Inc., 137 F.3d 976, 979 (7th Cir. 1998); Atlanta College of Medical and Dental Careers, Inc. v. Riley, 987 F.2d 821, 827 (D.C. Cir. 1993).

⁹ See, e.g., 7 U.S.C. § 624(d) (1980) (allowing the President to terminate or suspend "any proclamation or provision of such proclamation" upon a finding of changed circumstances); 13 U.S.C. § 91(b) (1990) (mandating that census statistics must be collected and published under the standards set forth in the statute "[e]xcept to the extent determined otherwise by the Secretary on the basis of changed circumstances"); 19 U.S.C. § 3105(d) (Supp. 1998) (permitting the President to modify or terminate any action taken under § 3105(a) if the President concludes that "changed circumstances warrant such modification or termination"); 22 U.S.C. § 2374(b) (1990) (precluding enforcement of § 2374(a) "if the President determines that such assistance is in the national interest of the United States because of substantially changed circumstances in Afghanistan"); and 19 U.S.C. § 1675(b) (Supp. 1997). Cf., 15 U.S.C. § 5672 (1998) (prohibiting alteration of the statute, even upon a finding of changed circumstances).

¹⁰ See 47 U.S.C. § 160(d).

intend to limit the Commission's authority to forbear from enforcement of Section 275 in any way, much less to require a finding of changed circumstances.

AICC's "changed circumstances" theory is also inconsistent with the overarching purpose of the Act -- "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers" -- because it forces consumers to sacrifice the benefits of additional competition and improved services without any countervailing benefit. Congress added the forbearance provision precisely so that the Commission could use its expertise to decide whether consumers would best benefit from enforcement or forbearance. After the Commission determines that the statutory criteria are met and that the benefits of forbearance outweigh the alleged harms, the stated purpose of the provision is satisfied.

AICC makes the additional argument that without a changed circumstances requirement, the forbearance provision represents an unconstitutional violation of the separation of powers doctrine. AICC Comments at 7. AICC argues mistakenly that Ameritech is urging the Commission to overrule Congress and relegislate Section 275. In truth, Ameritech is urging the Commission to follow the language in Section 160(a), engage in a precisely the type of factual, three-pronged analysis envisioned by Congress and conclude that forbearance is both warranted and mandated. As demonstrated above, it is AICC which attempts to "relegislate" by

altering the intended meaning of Section 160(a) through the addition of one more element to the forbearance standard. Therefore, the Commission should reject AICC's argument.

Far from giving the Commission the authority to relegislate in Section 160(a), Congress has provided a well-defined standard concerning how forbearance shall be granted. When Congress provides "by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform,"¹¹ the delegation passes constitutional muster. The Supreme Court long ago established that delegating to the Commission the task of deciding what is and what is not in the "public interest" conforms with constitutional separation of powers doctrine.¹² Section 160(a) requires the Commission simply to make the determination whether forbearance is in the public interest and adequately protects consumers and competition. After concluding that these elements are met, the Commission lacks discretion not to forbear. Certainly this statutory scheme does not give the Commission the authority to legislate and, therefore, represents a sound exercise of congressional delegation.

Finally, the Commission's decision in the *Section 272 Forbearance Order* demonstrates that no changed circumstances are needed to invoke Section

¹¹ See Loving v. United States, 116 S.Ct. 1737 (1996) (citations omitted).

¹² See National Broadcasting Co. v. United States, 319 U.S. 190, 225-26 (1943).

160. There, the BOCs' E911 service and Bell South's reverse directory service had been operating in the same fashion for years. There were no changed circumstances. Nevertheless, the Commission found that forbearance from the enforcement of Section 272 was appropriate.¹³

Thus, forbearance, even without a showing of changed circumstances, falls comfortably within the bounds of Commission precedent, constitutional norms and congressional intent. The Commission should exercise this authority to forbear from enforcement of Section 275(a) against Ameritech.

B. The Commission has the authority to grant Ameritech's petition for forbearance both as to transactions previously consummated and to transactions in the future

Both AT&T and AICC contend that forbearance cannot be granted retroactively to transactions completed in the past. AICC Comments at 13; AT&T Comments at 2-3. Neither, however, cites any precedent holding that the Commission must have express approval from Congress before it can apply a mandatory statutory forbearance provision to transactions that have already been consummated. In fact, the language of Section 10 and Commission precedent make it clear that forbearance is not limited to prospective occurrences.

¹³ *Section 272 Forbearance Order* at 2672, ¶ 98.

Section 160 provides that the Commission "shall forbear from applying" a provision of the Act when certain criteria are met. The language does not state the Commission shall forbear from applying the provision *prospectively* only. After finding that the three statutory criteria are satisfied with respect to a particular provision, the Commission cannot properly enforce that provision with respect to a prior activity because this would constitute impermissible enforcement at a time when the Commission has held that it is required to forbear from enforcement. If prospective enforcement is not in the public interest, neither is retroactive enforcement.

There is no requirement that Congress expressly grant authority in order for the Commission to forbear retroactively from applying Section 275(a) to transactions completed before the petition for forbearance was filed.¹⁴ As Ameritech

¹⁴ AT&T's reliance on Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988), for support is misplaced. That case involved the retroactive application of a reimbursement formula contained in Medicare rules issued in 1984 so as to require hospitals to return a portion of the payments made to them between 1981 and 1984 under the prior rules then in effect. The Court held that the statute did not authorize this "retroactive rulemaking" (488 U.S. at 215). The decision is not relevant here. In granting the forbearance petition, the Commission would not be engaged in rulemaking, let alone retroactive rulemaking. Instead, it would be exercising the authority clearly given to it by one provision of the Act not to enforce another provision of the Act. It would not be taking away an entitlement, as was the Secretary of Health and Human Services in Bowen. In fact, rather than extinguishing a right, the Commission would be restoring a right that Ameritech had before the passage of the Act -- the right to purchase equity in alarm monitoring companies. See also Yakima Valley Cablevision,

has repeatedly demonstrated, all of the asset acquisitions comply with Section 275(a), so the propriety of retroactive forbearance is a moot question. Even if this were not the case, under existing case law it is clear that the Commission has the power to retroactively forbear from enforcement. For example, the Commission's decision in the *Section 272 Forbearance Order* was "retroactive" because, just as here, the activities for which forbearance was requested - in that case the integrated provision of E911 and reverse directory assistance - occurred after the 1996 Act was passed but before the separation requirement of Section 272 was lifted by virtue of the forbearance order.

Neither AICC nor AT&T has alleged any harm from retroactive application of the forbearance requested by Ameritech, and indeed they could not do so. Therefore, since there are benefits but no harm to retroactive application, it is in the public interest that the Commission should forbear with regard to the past transactions.¹⁵

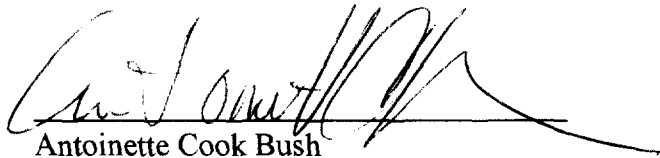
Inc. v. FCC, 794 F.2d 737 (D.C. Cir. 1986) (the D.C. Circuit stated that retroactive application of a forbearance policy is permitted if the Commission elaborates reasons why "the balancing of the harms and benefits favors giving . . . retroactive application.").

¹⁵ See S.E.C. v. Chenery Corp., 332 U.S. 194, 203 (1947) ("Every case of first impression has a retroactive effect, But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.")

Conclusion

For all of these reasons, the Commission can and should exercise its authority to forbear enforcement of Section 275(a) with respect to Ameritech's transactions in alarm monitoring services.

Respectfully submitted,



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I, Maureen R. Harrigan, hereby certify that on this 6th day of July, 1998, copies of the foregoing Reply to the Comments on Ameritech's Petition for Forbearance were served by hand delivery or by U.S. first class mail, postage pre-paid*, on the following:

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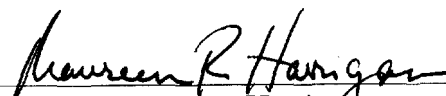
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